Supreme Court, U.S.
FILED
MAY 21 1987
JOSEPH F. SPANIOL, JR.
CLERK

86 1871

No. 86-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL FUEL GAS SUPPLY CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 21, 1987

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QUESTIONS PRESENTED

The questions presented with respect to the Judgment of the D.C. Circuit are:

1. Whether the Federal Energy Regulatory Commission ("Commission") has authority under the Natural Gas Act ("NGA") to prevent a pipeline from obtaining "first sale" prices for its own production as authorized by the Natural Gas Policy Act ("NGPA") by conditioning, *ex post facto*, the right to such prices? *Public Service Commission of the State of New York* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983) ("*Mid-La II*").

2. Whether the D.C. Circuit erred in concluding, in direct conflict with the holding of the Fifth Circuit in *Mid-Louisiana Gas Co.* v. *FERC*, 780 F.2d 1238, 1244 (1986) ("*Mid-La III*"), that NGPA pricing rights were "at issue" in NGA rate cases concluded while the Commission's unlawful rulemaking orders were in effect?

3. Whether the D.C. Circuit erred in abandoning its traditional rule of withholding deference to agency interpretations of settlement agreements and, by expansion of the Supreme Court's *Chevron* decision, in adopting a new rule of deference which is in direct conflict with the Fifth Circuit and the Sixth Circuit? *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

PARTIES TO THE PROCEEDINGS BELOW

The following parties were parties to the proceedings before the D.C. Circuit:

National Fuel Gas Supply Corporation;

Federal Energy Regulatory Commission;

Public Service Commission of the State of New York; and

Pennsylvania Public Utility Commission.

The Petitioner, National Fuel Gas Supply Corporation,[1] is a wholly-owned subsidiary of National Fuel Gas Company. Other wholly-owned subsidiaries of National Fuel Gas Company are: National Fuel Gas Distribution Corporation; Seneca Resources Corporation; Penn-York Energy Corporation; Empire Exploration, Inc.; Highland Land & Minerals, Inc.; and Enerop Corporation.

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[1] National is an interstate natural gas pipeline company that produces, purchases, stores, transports, and sells natural gas for resale in interstate commerce.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, National Fuel Gas Supply Corporation ("National") respectfully prays that a writ of *certiorari* issue to review the Judgment of the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") entered on February 20, 1987, in *National Fuel Gas Supply Corporation* v. *Federal Energy Regulatory Commission*, Nos. 84-1246 and 84-1285.

OPINIONS BELOW

The Opinion of the D.C. Circuit, issued February 20, 1987, is reported at 811 F.2d 1563. App. 1a.[2] The

[2] National has filed a separate Appendix which contains all opinions in this matter, including the Judgment below, as well as other pertinent materials. The Appendix will be referred to as "App.", followed by the appropriate page reference.

D.C. Circuit affirmed three orders issued by the Respondent Federal Energy Regulatory Commission ("Commission"), as follows: *National Fuel Gas Supply Corporation*, 26 FERC ¶61,105 (January 31, 1984);[3] 27 FERC ¶61,111 (April 20, 1984); and 28 FERC ¶61,012 (July 5, 1984).[4]

The D.C. Circuit relied on final orders of the Commission in two general rate proceedings initiated by National under Section 4 of the Natural Gas Act ("NGA"). Such orders, together with the Initial Decision underlying the first of these two general rate proceedings (App. 87a),[5] are reproduced at App. 111a and 305a, respectively.[6]

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the NGA, 15 U.S.C. 717r(b). National seeks review by the Supreme Court of the D.C. Circuit's Opinion, identified above, which was dated and entered February 20, 1987.

The jurisdiction of the D.C. Circuit was invoked under Section 19(b) of the NGA, *supra*.

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[3] The Commission's orders are published by Commerce Clearing House.

[4] National's petition for rehearing and suggestion for rehearing *en banc* was rejected and its motion to file a substitute petition was denied by the D.C. Circuit's order filed May 1, 1987. App. 84a.

[5] *National Fuel Gas Supply Corp.*, 5 FERC ¶63,017 (1978).

[6] *National Fuel Gas Supply Corp.*, 8 FERC ¶61,135 (August 6, 1979), related to "Period I", discussed, *infra*; and *National Fuel Gas Supply Corp.*, 15 FERC ¶61,058 (issued April 21, 1981), related to "Period II", *infra*.

STATUTES AND REGULATIONS

This case involves the following statutes and regulations which, because of their length, are set out *verbatim* in the Appendix accompanying this petition:

Natural Gas Act, 15 U.S.C. 717-717w:

- Sections 4, 5(a), and 19 (App. 135a, 141a, and 143a).

Regulations under the Natural Gas Act, 18 C.F.R.:

- Sections 154.38(d)(1) through 154.38(d)(4)(x) [Purchased Gas Adjustment ("PGA") regulations, App. 161a];
- Section 154.63 [general NGA Section 4 rate change regulations, App. 186a];
- Part 201, Account Nos. 795-798 [Uniform System of Accounts Prescribed for Natural Gas Companies Subject to the Provisions of the Natural Gas Act] (1979) (App. 217a).

Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432:

- Section 501(a), 15 U.S.C. 3411(a) [App. 148a];
- Section 601, 15 U.S.C. 3431 [App. 150a].

Regulations under the Natural Gas Policy Act of 1978, 18 C.F.R.:

- Section 270.203 (1979) [Order No. 58, found unlawful in *Mid-La II*] (App. 205a);
- Section 154.42 (1981) [Order No. 98, found unlawful in *Mid-La II*] (App. 208a);
- Current Section 154.42 [relating to NGPA pricing of pipeline production] (App. 215a).

STATEMENT OF THE CASE

The Natural Gas Policy Act of 1978 ("NGPA") "explicitly establishes an incentive pricing scheme", effective December 1, 1978, under which "all natural gas production falls within at least one of the [NGPA pricing] categories", and "[i]n none of the . . . categories . . . is the Commission given authority to require a rate lower than the statutory ceiling." *Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 333 (1983) ("*Mid-La II*"). Because of this "comprehensive" statutory scheme, the Supreme Court invalidated generic rulemaking orders, which had been made effective commencing December 1, 1978 (Order Nos. 58 and 98), in which the Commission had interpreted the NGPA to foreclose NGPA pricing of "old" gas owned by interstate pipelines.

The D.C. Circuit affirmed three Commission orders rejecting National's request, contained in a Purchased Gas Adjustment ("PGA") filing made pursuant to National's Tariff, to recover NGPA "first-sale" prices for its "old" company-owned production, for the period December 1, 1978 (the effective date of the NGPA) to June 1, 1982.[7] National made its PGA filing after the Supreme Court issued *Mid-La II* clarifying that Congress did not intend to treat gas production differently depending on who owned the production, *i.e.*, pipelines, like independent producers, were eli-

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[7] The Commission has explained that by PGA filings, "[c]hanges in purchased gas costs may take place while a final determination in a rate proceeding is pending." *Order No. 452-A*, 47 FPC 1510, 1511 (1972).

gible for "first-sale" prices for their "old" production.[8]

Between December 1, 1978 and June 1, 1982, however, presumptively valid Order Nos. 58 and 98, in conjunction with NGA regulations, operated affirmatively to require pipelines "as a matter of law" (according to the Commission)[9] to price their "old" production in NGA rate cases at levels below NGPA incentive prices, *i.e.*, at traditional cost-of-service prices.

Nevertheless, in the instant case the D.C. Circuit has affirmed Commission orders holding that National could not exercise its NGPA pricing rights for the period December 1, 1978 to June 1, 1982 because it had not affirmatively "preserved" such rights in its NGA rate proceedings.[10] In other words, it was through National's *silence* in such NGA proceedings, rather than through any knowing and deliberate act of waiver, that National is said to have lost such rights.

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[8] Section 601(b)(1)(E) of the NGPA limits amounts which pipelines pay their affiliates to the amount paid by such pipelines to independent producers in comparable transactions. National's request for NGPA pricing strictly complies with this rule of parity pricing. Accordingly, National did not request ceiling prices.

[9] *Order No. 391*, Regs. Preambles 1982-1985, FERC Stats. and Regs. (CCH) ¶30,588 at 31,086 (footnotes omitted). See App. 121a.

[10] National's "old" gas production at issue here constitutes nearly all of its company-owned production (during oral argument below, counsel for National noted that "new" gas was not at issue).

Furthermore, the D.C. Circuit, like the Commission, did not cite any statute or regulation that conditioned National's NGPA pricing rights for "old" gas to require affirmative action to preserve such rights. No doubt this was so because there was no such requirement until it was imposed, *ex post facto*, in the Commission orders here on review. Indeed, in its generic rulemaking docket the Commission had left the impression that no such preservation action was needed, for it denied a stay of its Order No. 58 pending judicial review, finding a lack of irreparable injury therefrom because the Commission "could authorize the collection of revenues denied by this provision through surcharges."[11]

Therefore, this case concerns Commission orders that perpetuate the same interpretation of the NGPA as was found to be illegal by the Supreme Court in *Mid-La II*. The D.C. Circuit has thus effectually changed the effective date of the NGPA from December 1, 1978 to June 1, 1982, and in that respect has illegally amended the NGPA.

The D.C. Circuit relied on "final orders" of the Commission in two NGA rate proceedings which established "Base Tariff Rates" for National.[12] The "Period I" order, together with its underlying Initial Decision, fixed National's Base Tariff Rates for the

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[11] "Order Granting Rehearing for Purposes of Further Consideration and Denying Stay," 6 FERC ¶61,077 at 61,151 (January 29, 1979). App. 314a.

[12] "The base tariff rate is the effective rate on file with the Commission *excluding adjustments effected pursuant to a PGA clause.*" Regulations under the Natural Gas Act, Section 154.38(d)(4), 18 C.F.R. 154.38(d)(4), App. 185a, emphasis added.

period from December 1, 1978 (the effective date of the NGPA) to October 1, 1980.[13] The "Period II" order approved a settlement which established National's Base Tariff Rates for the period from November 1, 1980 to June 1, 1982.[14]

The D.C. Circuit held that the NGPA pricing of "old" pipeline production was at issue in National's NGA rate cases, and hence that the Commission's "final orders" in such proceedings foreclosed National from exercising its NGPA pricing rights. This holding conflicts directly with the decision of the Fifth Circuit in *Mid-Louisiana Gas Co.* v. *FERC,* 780 F.2d 1238 (1986) (*"Mid-La III"*).

REASONS FOR GRANTING THE WRIT

The Supreme Court should grant a writ of *certiorari* to review the Opinion of the D.C. Circuit for the following reasons:

1. Because under the NGPA Congress unconditionally authorized "first sale" incentive prices for "old" pipeline production effective December 1, 1978, the Supreme Court should not permit the agency to abandon the rule of law by imposing, through administrative fiat, an *ex post facto* condition to the exercise of that statutory right.

2. The D.C. Circuit's brush-off of the Commission's misinterpretation of the statute as "simply . . . an

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[13] Such Base Tariff Rates applied commencing prior to December 1, 1978, but the period relevant to this case commenced on that date.

[14] *National Fuel Gas Supply Corp.*, 15 FERC ¶61,058 (issued April 21, 1981), App. 305a.

error of interpretation" will, if not corrected, encourage administrative agencies to substitute their own public policy views for those of Congress. The D.C. Circuit has failed to recognize the continuing obligation of the Commission to conform to the NGPA's mandate from its effective date and thus provide an opportunity for redress of the error.

3. The D.C. Circuit has rendered a decision in direct conflict with the decisions of other Federal Circuit Courts of Appeals on the same matter by its holdings that: (i) NGPA pricing rights were at issue in NGA rate cases concluded while the Commission's unlawful rulemaking orders were in effect [*contra,* Fifth Circuit in *Mid-La III*]; (ii) under a settlement which is not an integrated document purporting to govern all relationships between the parties, silence nevertheless constitutes a waiver of valuable economic rights [*contra,* Fifth Circuit in *Mid-La III*]; and (iii) the D.C. Circuit is required under the Supreme Court's *Chevron* decision to abandon its traditional rule of withholding deference to agency interpretations of settlement agreements and adopt a rule of deference which is in direct conflict with the Fifth Circuit and the Sixth Circuit.

4. The D.C. Circuit's expansion of the *Chevron* deference doctrine, unless corrected by the Supreme Court, will sabotage the administrative settlement process because (i) it allows one party to a settlement—the agency—to make a controlling "self-serving . . . post hoc reinterpretation of its contract," and (ii) it requires every settlement to expressly address every conceivable issue that might arise between the settlement parties at the peril of the Commission's

post hoc interpretation as to what was or what was not settled.

5. The D.C. Circuit's reliance upon inapplicable "new" gas regulations as decisional in this case, when this case involves only the pricing of National's "old" gas under the NGPA, and its resort to reasons not relied upon by the Commission in its orders, together constitute such an extreme departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

ARGUMENT

1. The D.C. Circuit's Decision Directly Conflicts with the NGPA and with the Supreme Court's *Mid-La II* Decision.

Effective December 1, 1978, the NGPA "comprehensively and dramatically changed the method of pricing of natural gas produced in the United States." *Mid-La II*, 463 U.S. at 322. The NGPA was "designed to supplant the Commission's authority [under the NGA] to establish rates for the wholesale market, the market consisting of so-called 'first sales' of natural gas." *Id.* at 331. Thus, in *Mid La II* the Supreme Court concluded that Congress did not intend to exclude pipeline production from this comprehensive statute. The Supreme Court emphasized that all gas production fell into one or another of the NGPA categories and that "[*i*]*n none of the eight categories . . . is the Commission given authority to require a rate lower than the statutory ceiling.*" *Id.* at 333 (emphasis added).

Despite the Supreme Court's decision, however, the D.C. Circuit asserts that the Commission has the au-

thority to *impose* rates lower than the statute permits for the period that its unlawful Order Nos. 58 and 98 were in effect.[15] Those orders, which were struck down in the Supreme Court's *Mid-La II*[16] decision, had held that "old" gas produced by a pipeline was *not* entitled to NGPA prices and that such gas production therefore remained subject to the Commission's cost-of-service regulation under the NGA.

After Order Nos. 58 and 98 were remanded, the Commission issued Order No. 391 in which it conceded that, once its existing regulations were invalidated, "[a]ny new regulations must be effective as of December 1, 1978, the effective date of the NGPA."[17] Yet, the D.C. Circuit has flouted the *Mid-La II* decision and has acted to perpetuate the illegal effect of Order Nos. 58 and 98.[18] In substance, the Commission has deferred the effective date of the NGPA and the will of Congress has not been carried out.

The D.C. Circuit upheld the Commission's ruling that National could not collect such prices because it had failed to act affirmatively to "preserve" its NGPA pricing rights in National's NGA rate proceedings. However, the D.C. Circuit's Opinion is devoid of any citation to the NGA, the NGPA, Commission regulations, or any other Commission order which at that

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[15]Opinion at 7.

[16] The Supreme Court affirmed the same conclusion of the Fifth Circuit in *Mid-Louisiana Gas Co.* v. *FERC*, 664 F.2d 530 (5th Cir. 1981) (*"Mid La-I"*).

[17] *Supra*, at 31,095; App. 130a.

[18] The Commission has done the same thing on an industry-wide basis in Order No. 391.

time required such affirmative action by National in order to "preserve" its NGPA pricing rights. Furthermore, Congress granted NGPA pricing rights without condition.[19]

Because Order Nos. 58 and 98 exceeded the Commission's statutory authority, such regulations were a "legal nullity" during the December 1, 1978 to June 1, 1982 period:

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. Á regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity. * * *"[20]

Hence it *remained* the Commission's obligation to "carry into effect the will of Congress" pursuant to Section 501 of the NGPA because the effect of *Mid-La II* was:

> "* * * not to make a new law, but only to hold that the law always meant what the court now says it means. The court has power

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[19] "* * * [I]t was an unreasonable construction of this comprehensive and exhaustive new legislation, contrary to its structure, purposes, and history, for the Commission to chop out virtually all pipeline production and to relegate it to discretionary regulation under the NGA. * * *" *Mid-La II*, 463 U.S. at 343, fn. 24.

[20] *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936) (citations omitted).

> to construe a legislative act, but it has no power, by change in construction, to date its passage as a law from the time of later decision. A statute in force when . . . [the Commission's unlawful regulations] were made cannot be made a subsequent statute through new interpretation by the courts. * * *[21]

The D.C. Circuit, noting that "* * * the Supreme Court did not require the Commission to apply the *Mid-Louisiana Gas II* decision retroactively to modify all of the final rate orders that have been entered over the years since the [NGPA] was enacted * * *," has sanctioned a delay in the December 1, 1978 effective date of the NGPA for National's "old" pipeline production because "* * * [w]ithout any such explicit command, the usual presumption is that a judicial decision should be given prospective effect except in the particular case in which the ruling is made. * * *" Opinion at 7. But, contrary to this D.C. Circuit holding:

> "* * * [i]t is essential that where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise * * *."[22]

Thus, the issue here is whether the Commission has enforced the *statute* (as contrasted with the Supreme Court's *Mid-La II* mandate) because *the Commission*

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[21] *Fleming* v. *Fleming*, 264 U.S. 29, 31-32 (1924); *accord, Functional Music, Inc.* v. *FCC*, 274 F.2d 543, 547-48 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).

[22] *Mahler* v. *Eby*, 264 U.S. 32, 44 (1924).

is without authority to do otherwise. Accordingly, the "usual presumption" relied on by the D.C. Circuit is not germane to this case.

The D.C. Circuit has affirmed action of a Commission which was *not* looking for ways to *carry out* the intent of Congress but which was doggedly continuing its efforts, first begun in Order Nos. 58 and 98, to *deny* those rights.[23] The Commission's condition which *presumes* the need for affirmative action to preserve NGPA pricing rights is contrary to the intent of Congress that NGPA pricing rights *shall be available as of December 1, 1978.*[24]

The Commission, moreover, created an *ex post facto* condition to the collection of "first sale" prices for "old" gas, such condition being that National (and every other pipeline similarly situated) must have acted affirmatively in NGA rate cases to preserve those *unqualified* NGPA pricing rights.[25] Such a condition is manifestly unlawful, both because it was imposed *ex post facto* and also because it is contrary to

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[23] Despite the Commission's action resulting in *Mid-La III, supra,* despite the Commission's action in the instant case, and despite the Commission's effort to do the same thing industry-wide in the more recent Order No. 391, the D.C. Circuit absolved the Commission from *ultra vires* motives, concluding that "* * * [t]here is no imputation that the Commission has embarked on a deliberate program to sabotage the [NGPA's] provisions or to refuse to carry out its mandates * * *." Opinion at 7.

[24] The statute is based on numerous dates which control not only the price but also the time when the Commission's regulatory authority over certain categories of gas ceases. The dates in the statute are, therefore, an integral part of the statutory scheme and must be enforced.

[25] Orders on review, as later fixed by general rule in *Order No. 391, supra.*

the NGPA, under which the Commission is without authority to "* * * require a rate lower than the statutory ceiling." *Mid-La II, supra*, 463 U.S. at 333.

National seeks a writ of *certiorari* from this Court in order to put an end to the Commission's steadfast refusal to implement the NGPA consistent with the provisions of the statute and this Court's *Mid-La II* decision.

2. The D.C. Circuit's Decision Is in Direct Conflict with the Fifth Circuit's *Mid-La III* Decision on the Same Matter.

The Fifth Circuit in *Mid-La III* rejected the Commission's arguments where the salient operative facts are identical.

More specifically, Mid-Louisiana Gas Company ("Mid-Louisiana") instituted a Section 4 rate proceeding under the NGA to fix Base Tariff Rates during the period that Order No. 58 was effective and presumptively valid.[26] Its tariff sheets instituting that rate case priced Mid-Louisiana's "old" gas following the cost-of-service method required by Commission NGA regulations for such filings.[27] In these circum-

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[26] *Mid-La III, supra*, 780 F.2d at 1240.

[27] *Ibid.* In this crucial respect, the *Mid-La III* facts are jurisdictionally different from the facts before the Fourth Circuit in *Consolidated Gas Supply Corp.* v. *FERC*, 745 F.2d 281 (4th Cir. 1984), *cert. denied*, 105 S.Ct. 2702 (1985). In *Consolidated*, the pipeline had initiated its NGA rate cases with tariff sheets claiming NGPA prices for "old" gas. 745 F.2d at 285 (the first period); and 22 FERC ¶61,120 at 61,181 (1983) (the second period). In each case, the Commission had rejected those tariff sheets. *Id.* Consolidated, having put the issue of NGPA pricing "in play" in its NGA rate cases (in defiance of Order No. 58), obviously was "aggrieved" and had an obligation under NGA Section 19 to follow through to preserve its rights.

stances, the Fifth Circuit held that "* * * Mid Louisiana's statutory right to reprice its company-owned production at NGPA rates was simply not at issue in the . . . section 4 rate case, * * *"[28] and that, accordingly, the final order in the NGA case did not speak to that matter.

Thus, the D.C. Circuit's holding that National's NGPA pricing rights were at issue in National's Period I and Period II rate cases conflicts with the *Mid-La III* decision of the Fifth Circuit holding that in such cases NGPA rights were "simply not at issue."

Further, as in National's Period II rate case, Mid-Louisiana's Section 4 rate case concluded in a settlement. The *Mid-La III* settlement agreement contained "disclaimer" language limiting its scope to matters set forth in such agreement.[29] The settlement did not address NGPA pricing rights one way or the other. Because NGPA pricing rights were not at issue, the Fifth Circuit refused to accept the Commission's argument that Mid-Louisiana, by reason of the silence of the settlement, had waived its NGPA pricing rights. The Fifth Circuit thus refused to neuter the settlement "disclaimer" language as the D.C. Circuit did here.

According to the Fifth Circuit, "* * * [t]he Commission based its denial of NGPA prices on the 1981

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[28] *Mid-La III, supra*, 780 F.2d at 1244.

[29] "* * * This clause provides that 'except as expressly stated herein, no party shall be deemed to have approved, accepted, agreed, or consented to any rate-making or tariff principle or any method of cost of service determination . . . underlying or supposed to underlie any of the rates, refunds, or future adjustments to rates provided herein.' * * *" 780 F.2d at 1244.

settlement agreement . . . [holding that] Mid Louisiana had bargained away its right to reprice its pipeline production . . . by failing to specifically preserve that right in the settlement agreement itself." *Id.* at 1242. This Commission argument, rejected by the Fifth Circuit, is the identical Commission argument which the D.C. Circuit embraced in the instant case.

Moreover, the Fifth Circuit noted that the settlement agreement "* * * plainly shows that Mid Louisiana's company-owned production was priced on a cost-of-service basis. * * *" *Id.* at 1243. Nevertheless, the Fifth Circuit held that:

> "* * * Absent an integrated document purporting to govern all relationships between the parties, . . . silence will not be taken to indicate relinquishment of a valuable right. *Mobil Oil*, 570 F.2d at 1025; *Texas Gas Transmission*, 441 F.2d at 1396."
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> "* * * Settlements pertain only to those issues which they specifically resolve . . . [and] cannot be construed as having general application even to arguably analogous issues which the agreement does not purport to cover.' * * *."[30]

In this case—also involving a non-integrated settlement—the D.C. Circuit held on the same facts that

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[30] *Mid-La III*, *supra*, 780 F.2d at 1244. Indeed, the D.C. Circuit's holding to the contrary departs from its own prior precedent. *Mobil Oil Corp.* v. *FPC*, 570 F.2d 1021, 1025 (D.C. Cir. 1978).

National's NGPA pricing rights were at issue and were waived by the settlement's silence.[31]

The Fifth Circuit also held that Mid Louisiana was bound by the prevailing Commission regulations when it followed cost-of-service pricing in its Section 4 rate case under the NGA:

> "Though the settlement . . . was negotiated in a period of legal uncertainty regarding a pipeline's rights under the NGPA, Mid Louisiana was nevertheless bound by effective Commission regulations when it filed its proposed tariff sheets in that rate proceeding. [Citations omitted] One such regulation, Order No. 58, required that 'old' company-owned production be priced on a cost-of-service basis. Had Mid Louisiana and its customers not reached a settlement, the pipeline's rates would have been set by the Commission after a hearing, utilizing cost-of-service pricing for company-owned 'old' gas.

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[31] Indeed, in a self-contradictory finding, the D.C. Circuit found, on the one hand, that the "* * * Commission concluded that the settlement *addressed* the issue of whether to value NFGS' own gas on a cost-of-service basis * * *" (Opinion at 10; 18-19; 20, emphasis added) but, on the other hand, that the settlement's "*complete failure to mention this issue* constituted [National's] implicit" waiver of its NGPA pricing rights (*Id.* at 19, emphasis added). In fact, the Commission did *not* conclude that the settlement addressed the issue "of whether to value National's own gas on a cost-of-service basis." Rather, the Commission merely recited the *fact*, as did the Fifth Circuit in *Mid-La III* when it reached the opposite conclusion (780 F.2d at 1243), that "National Fuel included costs in the settlement agreement reflecting cost-of-service pricing for all of its pipeline production." 27 FERC at 61,210; App. 49a.

> The rates ultimately settled upon were not transfigured by the happenstance that they were arrived at through an agreement, rather than through government action. In basing its rates on its cost-of-service, Mid Louisiana was simply adhering to Commission regulations that were binding at that time." 780 F.2d at 1244.

In contrast, the D.C. Circuit concluded that it was "not strictly correct" that National was "bound [by the NGA regulations] to accept cost-of-service valuation of its own gas production . . . ."[32] Rather, it concluded that National had waived its rights through the silence of the settlement on this issue.[33]

The D.C. Circuit did concede that its reading of the settlement to infer a waiver from silence had one "real difficulty", namely, a reconciliation of the D.C. Circuit's reading with the settlement's general disclaimer stating that "no party to this proceeding shall be deemed to have waived any claim or right which it may otherwise have with respect to any mat-

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[32] Opinion at 19. The D.C. Circuit plainly did not consider the mandatory nature of the *NGA* regulations requiring cost-of-service pricing (18 C.F.R. 154.63) because it answered National's argument, which was predicated on mandatory *NGA* regulations, by reference to *NGPA* regulations (it said, "if those regulations were later overturned by the Courts").

[33] Further, the D.C. Circuit did not mention its virtually simultaneous and contrary *Jersey Central* decision in which it held that the imputation of a waiver of rights through silence is "* * * unfair since . . . one must read into the filing an *implied* waiver of statutory . . . rights. * * *" *Jersey Central Power & Light Co.* v. *FERC*, 810 F.2d 1168, 1185 (D.C. Cir. 1987), emphasis added.

ters not expressly provided for herein." Opinion at 19-20. But, begging the issue, the D.C. Circuit dismissed this "difficulty" as "insufficient to constitute an express reservation of a right to make retroactive adjustments in these rates," again relying on its finding, conflicting with that of the Fifth Circuit, that:

> "* * * the matter of how to value [National's] gas production is 'expressly provided for' in the agreement * * *" (*Id.* at 20).

The D.C. Circuit purported to corroborate its neutering of the settlement's disclaimer language by pointing to what it characterized as "a very important reason", namely, the fact that, as to three separate issues, express reservations of rate-changing rights had been included in the settlement. Opinion at 20. In resorting to this analysis, however, the D.C. Circuit, as with its assertion that National's pricing rights were at issue (fn. 31, *supra*), again strayed beyond the Commission's own findings, thereby violating the rule of *Chenery* which "* * * requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself * * *."[34]

Beyond that, the D.C. Circuit erred by failing to realize that, unlike NGPA pricing rights which were *not* at issue, the matters expressly reserved in the settlement *were* at issue in National's NGA rate case. Indeed, if the settlement had not expressly provided

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[34] *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962), citing *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). It may be noted that the D.C. Circuit's action was inconsistent with its own recent Jersey Central decision, where the D.C. Circuit derogated an argument which "* * * was never advanced by the Commission." *Supra*, 810 F.2d at 1182-83.

for the three separate issues, the Base Tariff Rates in that NGA rate case could not have been modified without National filing an entirely new rate case. See 18 C.F.R. 154.63, *infra*, App. 186a.

Moreover, the D.C. Circuit ignored the fact that the settlement, which fixed "base tariff rates" for National,[35] contained a provision which explicitly allowed PGA filings for changes in the price of gas.[36]

National submits that the D.C. Circuit has approved a Commission requirement that is nothing less than an after-the-fact bar to National's NGPA pricing rights for its "old" gas production. As such, the D.C. Circuit has entered a Judgment which directly conflicts with the Fifth Circuit's *Mid-La III* decision.

3. The D.C. Circuit's Opinion Misapplied the Supreme Court's *Chevron* Rule of Judicial Deference.

The D.C. Circuit relied on the Supreme Court's *Chevron* decision as requiring deference to the Com-

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[35] Article I, *infra*, App. 232a.

[36] In Article III of National's settlement, cost of gas surcharge adjustments pursuant to National's PGA tariff provisions were expressly allowed:

"Section 2. The [base tariff] rates provided for in Section 1, above, *as changed from time to time pursuant to National Fuel's FERC Gas Tariff* and this Stipulation and Agreement, shall remain in effect until the termination * * *." *Infra*, App. 239a, (emphasis added).

National's Tariff, in Section 17 of its General Terms and Conditions, provides for PGA surcharge adjustment filings (see *infra*, App. 284a). Despite this express settlement provision, the D.C. Circuit totally ignored it and erroneously held that: "* * * the disclaimer only preserves rights that NFGS 'may otherwise have,' but we have been unable to identify any other grounds for [National] to claim such a right." Opinion, at 20.

mission's interpretation of the settlement agreement in National's NGA rate case for Period II. The D.C. Circuit held that:

> "* * * [b]y far the most important [reason for according such deference] is that the Supreme Court's decision in *Chevron* . . . has rejected the view that a court may freely review an agency on pure questions of law. * * *" Opinion at 11.

Elaborating, the D.C. Circuit held:

> "* * * that *Chevron* has implicitly modified earlier cases that adhered to the traditional rule of withholding deference on questions of contract interpretation. *See, e.g., Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268)70 (1960) (upholding de novo review of an agency's interpretation of a contract). * * * In *Chevron*, by contrast, the Court recognized that where Congress has made an explicit or implicit grant of power to an agency over certain matters, that grant of power embodies congressional recognition of the agency's 'special competence' to handle those matters, and compels deference from the courts in reviewing how that power is exercised. * * *" *Id.* at 13-14.

The D.C. Circuit acknowledged that its holding conflicts with the rule of law in other Circuits—in particular, the Fifth Circuit's *Mid-La III* decision and the Sixth Circuit's *Cincinnati Gas* decision.[37]

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[37] Opinion, at 10, citing *Cincinnati Gas & Electric Co.* v. *FERC*, 724 F.2d 550, 554 (6th Cir. 1984).

The D.C. Circuit's application of *Chevron* represents an unwarranted expansion of the deference principles established in that case. First, *Chevron* involved an agency's interpretation of a statute. While it may be fair to presume that an agency is impartial in interpreting a statute to fill a legislative gap, this case does not involve the interpretation of a statute.

Rather, this case involves an agency interpretation of a settlement. The Commission is required to be actively involved in the approval of settlements which conclude litigation before it—for example, in granting such approvals the Commission often modifies or conditions the settlement. Consequently, once the Commission approves a settlement it cannot be fairly characterized as a disinterested party.

The D.C. Circuit admitted that "* * * if the agency itself were an interested party to the agreement, deference might lead a court to endorse self-serving views that an agency might offer in a post hoc reinterpretation of its contract. * * *" Opinion at 17. However, the D.C. Circuit went on to hold that the Commission is not a party to a settlement once it is approved. Opinion at 17.

The D.C. Circuit thus breezed past earlier precedents, such as its own *Mobil* opinion, holding that:

> "* * * because the Commission as *party to the settlement* was bound by it [citations to the Sixth Circuit, D.C. Circuit, and Tenth Circuit omitted], the Commission must, at least in the absence of special circumstances, comply with the settlement * * *."[38]

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[38] *Mobil Oil Corp.* v. *FPC, supra*, 570 F.2d at 1026 (emphasis

Case law in three Circuits thus clearly establishes that the Commission is a party to the settlement, having obligations the same as any other party. Hence, if the D.C. Circuit's expansion of the *Chevron* doctrine is allowed to stand it will change the law and for the first time vest in only one of the settlement parties (the Commission) a unilateral right to "advance self-serving views * * * in a post hoc reinterpretation of its contract."

The unreasonableness of the D.C. Circuit's holding is manifest in the circumstances of this case. Here, the Commission adopted an "interpretation" of the settlement's *silence* that effectively breathed new life into the Commission's unlawful interpretation of the NGPA as contained in Order Nos. 58 and 98. The Commission was not exercising special expertise which Congress entrusted to that agency. Rather, on its face the Commission's interpretation reflects:

> "* * * the danger that an agency, having reached a particular result [in Order Nos. 58 and 98], may become so committed to that result as to resist engaging in any genuine reconsideration of the issues. The agency's action on remand must be more than a barren exercise of supplying reasons to support a pre-ordained result. * * * *See Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 . . . (1962)."[39]

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added), citing *Texas Gas Transmission Corp.* v. *FPC*, 441 F.2d 1392, 1394 (6th Cir. 1971); *Tennessee Gas Pipeline Co.* v. *FPC*, 504 F.2d 199, 202 (D.C. Cir. 1974); and *Continental Oil Co.* v. *FPC*, 373 F.2d 96 (10th Cir. 1967).

[39] *Food Marketing Institute* v. *ICC*, 587 F.2d 1285, 1290 (1978).

The Commission has shown that it was deeply and openly antagonistic to allowing pipelines to receive NGPA incentive prices for their "old" pipeline production. Its "expertise" on that question had been completely destroyed. The Commission's *ultra vires* conduct thus infected the very areas which Congress entrusted to the Commission's care, casting a *prima facie* shadow on the Commission's interpretation of the Period II settlement.

The instant case clearly illustrates the unsoundness of expanding the *Chevron* doctrine to require deference to agency interpretations of settlements. National therefore asks the Supreme Court to correct the D.C. Circuit's error in expanding the *Chevron* rule of judicial deference.

4. The D.C. Circuit's Decisional Reliance upon Inapplicable "New" Gas Regulations and upon Unsupported Findings Requires the Exercise of the Supreme Court's Power of Supervision.

The bases for the D.C. Circuit's Judgment relating to Period I were a Commission "final order" that ruled only on National's "new" gas and Commission regulations relating only to "new" gas, even though the issue here relates only to National's "old" pipeline production. Opinion at 8-9, 19.

a. The Commission's Period I Order.

The D.C. Circuit held that in National's Period I case the Commission had ruled that "* * * National Fuel's own production . . . should be priced on a cost of service basis rather than on the basis of applicable nationwide rates * * *" (Opinion, at 8-9, citing the Commission's Period I final order at 8 FERC ¶61,135, 61,517); and that "* * * [t]he magnitude of the various

service costs that went into valuing this gas were fully considered and determined in the proceedings that culminated in that [Period I] order, and the purchased gas adjustment procedures simply cannot be invoked to modify those determinations at this point." *Id.* at 9.

However, the excerpt from the Commission's "final order" relied on by the D.C. Circuit *was not* a Commission ruling related to National's "old" gas. Rather, the Commission's specific ruling was to affirm the Initial Decision of the Administrative Law Judge ("ALJ"). The ALJ's Initial Decision, in turn, related only to the issue of the pricing of the "new" gas portion of National's company-owned gas production, *i.e.*, only 5% of the total.[40]

b. The Commission's "New" Gas Regulations.

Erroneously relying on "new" gas regulations of the Commission, the D.C. Circuit found that National's "old" gas "conceivably could have been" priced "on the basis of area or nationwide rates" during the Period I rate case (Opinion, at 8), and that National "could have sought to value this ["old"] gas at higher prices, but did not" (*Id.* at 9). The D.C. Circuit mis-

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[40] *National Fuel Gas Supply Corporation*, Docket Nos. RP76-96, *et al.*, 5 FERC ¶63,017, 65,148-49, 65,154, fn. 522 (1978). In his initial decision, the ALJ correctly stated that "[o]f the 8,446,100 Mcf [of National's total production] involved, [the Staff witness] Fisher estimated that 494,700 Mcf would qualify for national rate treatment. . . ." 5 FERC at 65,148. The method of pricing the "old" gas—the other 8 million Mcf—was totally governed by the Commission's NGA regulations requiring cost-of-service pricing of such gas and was not a "reserved issue" decided in the Initial Decision or in the final order of the Commission.

apprehended that under the Commission's *NGA* regulations National was *not* free to elect the method of pricing its "old" gas in general rate cases under Section 4.

The Commission recently summarized the historical ratemaking treatment accorded to pipeline production, as follows:

> "Under the NGA, the Commission developed a regulatory program under which it determined the cost (or value) of a pipeline's own production in one of two ways. Production of the pipeline's 'old gas' was valued on a cost-of-service basis . . . . The valuation of the pipeline's new gas production was based on the applicable area or nationwide rates (established by the Commission), which independent producers were permitted to charge for the gas they produced and sold.
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> * * * * * * *
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> "Initially, the Commission interpreted the language of the NGPA to prohibit most pipeline production from qualifying *as a matter of law* for the NGPA first sale prices [referring to Order Nos. 58 and 98]. Therefore, the Commission *required* interstate pipelines *to continue pricing their old gas . . . on a cost-of-service basis, not at NGPA levels.*"[41]

Thus, when it issued its Order No. 58 the Commission effectuated its unlawful interpretation of the NGPA by *continuing the effectiveness* of the historical NGA

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[41] *Order No. 391, supra,* at 31,086, emphasis added (footnotes omitted). See App. 126a-128a.

regulations requiring cost-of-service pricing for "old" pipeline production. The D.C. Circuit therefore patently erred in concluding that National could have priced its "old" gas at NGPA levels during the period that Order Nos. 58 and 98 were binding "as a matter of law".

c. The Need for Supreme Court Supervision.

The D.C. Circuit's errors of law, outlined above, have worked to deny National the fair and reasoned judicial review required by Section 19(b) of the NGA.[42] The D.C. Circuit's misplaced reliance on "new" gas authorities is an analysis that "* * * refutes a position that no one advocates. * * *"[43] Moreover, as we have noted, the D.C. Circuit has supported its decision with findings that the Commission did not rely upon.

The D.C. Circuit's conclusion that the "final orders" in National's NGA rate cases foreclosed National's right to NGPA pricing for its "old" gas is fundamentally flawed. Thus, when Congress enacted the NGPA it obviously became essential to the implementation of the new statutory pricing scheme for the Commission to allow changes in the pricing of pipeline production. If the Commission had properly discharged its responsibility, therefore, cost-of-service Base Tariff Rates prevailing under "final" rate orders as of December 1, 1978 would have been "reopened" to the extent necessary to implement the legislative intent. The delay in that process, resulting from the Commission's unlawful rulemaking orders, does not cast any different light on the process. The Commis-

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[42] See also *SEC* v. *Chenery Corp., supra*, 332 U.S. at 196.

[43] *Mid-La II, supra*, 463 U.S. at 340.

sion remains obligated—now as before—to effectuate the December 1, 1978 statutory effective date.

The D.C. Circuit has spoken to the need for Court supervision in relation to actions of administrative agencies, especially where it appears,

> "* * * from a combination of danger signals, that the agency has not really taken a 'hard look' at the salient problems, and has not genuinely engaged in reasoned decision-making. * * *"[44]

National submits that the D.C. Circuit's opinion reveals such danger signals and, therefore, the Supreme Court should exercise its supervisory powers.

CONCLUSION

For the reasons identified and explained above, National submits that its petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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May 21, 1987

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[44] *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).